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IN THE

Supreme Court of the United States

October Term, 1973
No. 73-557

BILLY JENKINS,

Appellant,

vs.

STATE OF GEORGIA,

Appellee.

On Appeal From the Supreme Court of Georgia.

Brief Amicus Curiae for Adult Film Association of America, Inc.

Interest of the Amicus.

The Adult Film Association of America files this Brief as *amicus curiae* with the written consent of both appellant and appellee.

The Adult Film Association of America is a membership corporation consisting of producers, distributors and exhibitors of motion picture film, directed primarily at adult audiences.

Amicus curiae has a substantial interest in the determination of the issues presented by this case. Films produced, distributed and exhibited by Association members find their way into every corner of our country, and *amicus* is concerned with the standards pursuant to which motion picture films may be judged. *Amicus* believes that the new tests of obscenity an-

nounced in *Miller*, and largely adopted by the Georgia Supreme Court, fail to provide either "fair notice" or "concrete guidelines" as to what motion picture films are criminally obscene. Accordingly, members of the Association, all of whom are law-abiding citizens, face the possibility of criminal prosecution under standards which are, it is respectfully submitted, essentially meaningless. In addition to being concerned about its members, *amicus* is opposed to censorship, believing it to be the sworn enemy of freedom and liberty. The Association is deeply committed to the principles of freedoms of speech and press upon which our country was built and prospered.

Summary of Argument.

1. Georgia has defined obscenity by amalgamating the abandoned *Roth, Memoirs* test with the *Miller* test. The Georgia standards for identifying obscenity fail to provide either "fair notice" or "concrete guidelines" as to what motion picture films are criminally obscene, since those standards rely on such indefinite concepts as "prurient interest", "patent offensiveness", "utterly without redeeming social value" and "serious value". These standards are as uncertain as "the unknown substance of the Milky Way". Transferring from the Court to the jury "the awesome task of making case-by-case at once the criminal and constitutional law" would lighten the burden of this Court but it does not cure, and indeed exacerbates, the vice of vagueness. "*Ad hoc* legislation" by a jury in this area constitutes a denial of due process and is the functional equivalent of an *ex post facto* law.

2. To compensate for the inherent and inevitable vagueness involved in defining obscenity, due process of

law requires that there be a prior judicial determination of a work's obscenity before a State initiates criminal proceedings. In order to minimize the conflict with First Amendment rights, the civil proceedings must be hedged about with adequate procedural safeguards, including the right of a determination by a jury as to the obscenity of a challenged film.

3. Allegedly obscene material should not be suppressed unless such material not only offends state standards, but also the standards of the geographic area from which a particular jury is drawn. Since it is only "obscenity" that is excluded from constitutional protection, the question of whether a particular work is obscene necessarily implicates First Amendment questions. Any restriction on the right of citizens to freely express themselves, and the right of the public to know, must have at the very least a state justification; it cannot depend for its validity upon the capriciousness or whim of a "local community". However, if a jury drawn from a particular geographic area is of the view that material does not offend the standards of the particular community, then in the light of First Amendment guarantees such community should have its way and be permitted to view and see and hear what the community deems tolerable. In brief, a local community may tolerate what the State generally does not, but a local community should not be permitted to suppress what the State tolerates.

4. The Court should make clear, it is submitted, that the phrase "literary, artistic, political or scientific" was not intended to delineate strict categories of ideas which alone are protected by the First Amendment. The Constitution gives broad protection to the dissemination of ideas. Freedom of expression is deemed im-

portant for the enhancement of human dignity, to enable the people to govern themselves, to alleviate individual and societal tensions, and to assure that the thinking process of the community will in no sense be mutilated. Ideas which are informational, educational, and entertaining have been recognized as important by this Court, and indeed, the Court has held that the rights of free speech and a free press are not confined to any field of human interest. Therefore, the Court should clarify its ruling in *Miller* to the extent of enunciating the principle that the First Amendment protects works which, taken as a whole, have tangible "literary, artistic, political, scientific, informational, educational, or entertaining ideas, or any other ideas of human interest".

ARGUMENT.

I

Georgia Code Ann. Section 26-2105, on Its Face and as Construed and Applied by the Supreme Court of Georgia, Fails to Provide Either "Fair Notice" or "Concrete Guidelines" as to What Motion Picture Films Are Criminally Obscene.

A. Seventeen years ago, Judge Jerome Frank, in a concurring opinion, wrote what is probably the best judicial essay on obscenity. *United States v. Roth,* 237 F.2d 796 (2 Cir. 1956). After calling "obscenity" an exquisitely vague crime, he went on to say: "The exquisite vagueness of the word 'obscenity' is apparent from the way the judicial definition of that word has kept shifting. . . . A standard so difficult for our ablest judges to interpret is hardly one which has a 'well-settled' meaning, a meaning sufficient adequately to advise a man whether he is or is not committing a crime if he mails a book or picture." (237 F.2d at 826).

In *Roth v. United States,* 354 U.S.476, this Court rejected Judge Frank's suggestion that the obscenity statute there at issue was unconstitutionally vague, saying:

> " . . . [T]he Constitution does not require impossible standards; all that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . . These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark . . . boundaries sufficiently distinct for judges and juries fairly to administer the law. . . ." (354 U.S. at 491.)

The "tortured history of the Court's obscenity decisions" attests to the accuracy of Judge Frank's assertion that the crime of "obscenity" is indeed exquisitely vague. Justice Stewart, concurring in *Jacobellis v. Ohio*, 378 U.S.184, observed that it is "possible to read the Court's opinion in Roth . . . in a variety of ways. In saying this, I imply no criticism of the Court, which . . . was faced with the task of trying to define what may be indefinable". (378 U.S. at 197). Some ten years after this Court decided *Roth*, Justice Harlan said: "[A]nyone who undertakes to examine the Supreme Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment." *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S.676, 707. It is no overstatement to assert that every Justice faced with the problem of defining obscenity has recognized its inherent vagueness.

In *Miller v. California*, 93 S.Ct.2607, 2610, Chief Justice Burger spoke of "the intractable obscenity problem". Recognizing that the question of obscenity had evoked "a variety of views among the members of the Court unmatched in any other course of constitutional adjudication", the Chief Justice went on to say: "This is not remarkable, for in the area of freedom of speech and press the courts must always remain sensitive. . . . This is an area in which there are few eternal verities." (93 S.Ct. at 2614). Chief Justice Burger asserted that as a result of this vagueness, "this Court was compelled to embark on the practice of summarily reversing convictions for the dissemination of materials that at least five members of the Court, applying their separate tests, found to be protected by the First Amendment. . . . The *Redrup* procedure has cast

us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us." (93 S.Ct. at 2614, n. 3).

Justice Brennan, dissenting in *Paris Adult Theatre I v. Slaton*, 93 S.Ct.2628, made the same point. After stating that the Court had failed to formulate a satisfactory standard for separating protected from unprotected speech, Justice Brennan went on to say that out of necessity the Court "resorted to the *Redrup* approach, which resolves cases as between the parties, but offers only the most obscure guidance to legislation, adjudication by other courts, and primary conduct. By disposing of cases through summary reversal or denial of certiorari we have deliberately and effectively obscured the rationale underlying the decision. It comes as no surprise that judicial attempts to follow our lead conscientiously have often ended in hopeless confusion." (93 S.Ct. at 2647).

Justice Brennan, the architect of the Court's obscenity decisions from *Roth* to *Memoirs*, stated the vagueness problem did not flow primarily from the Court's failure to reach a consensus on any one standard.[1] The real problem, he said, was that it was simply impossible

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[1]Indeed, as Justice Brennan saw it, the differences between the concededly vague *Memoirs* test and the *Miller* test "are, for the most part, academic" (Brennan, dissenting in *Paris*, 93 S.Ct. at 2653). The *Miller* rephrasing of *Memoirs*, Justice Brennan said, contains all the same difficulties and ambiguities.

> "The Court evidently recognizes that difficulties with the *Roth* approach necessitate a significant change of direction. But the Court does not describe its understanding of those difficulties, nor does it indicate how the restatement of the *Memoirs* test is in any way responsive to the problems that have arisen. In my view, the restatement leaves unresolved the very difficulties that compel our rejection of the underlying *Roth* approach. . . ." (Justice Brennan, dissenting in *Paris*, 93 S.Ct. at 2654).

to define obscenity without impinging on First Amendment rights. "[A]fter 15 years of experimentation and debate, I am reluctantly forced to the conclusion that none of the available formulas, including the one announced today, can reduce the vagueness to a tolerable level. . . . Any effort to draw a constitutionally acceptable boundary . . . must resort to such indefinite concepts as 'prurient interest', 'patent offensiveness', 'serious literary value' and the like. The meaning of these concepts necessarily varies with the experience, outlook, and even idiosyncrasies of the person defining them. . . . [W]e are manifestly unable to describe [obscenity] in advance except by reference to concepts so elusive that they fail to distinguish between protected and unprotected speech. . . . I need hardly point out that the factors which must be taken into account are judgmental and can only be applied on a 'case-by-case, sight-by-sight basis' ". (Justice Brennan, dissenting in *Paris*, 93 S.Ct. at 2647, 2648).

Even the most painstaking efforts to determine in advance whether certain sexually oriented expression is obscene "must inevitably prove unavailing. For the insufficiency of the notice compels persons to guess not only whether their conduct is covered by a criminal statute, but also whether their conduct falls within the constitutionally permissible reach of the statute. The resulting level of uncertainty is utterly intolerable . . . because it makes 'bookselling [and film exhibiting] . . . a hazardous profession. . . .' " (Justice Brennan, dissenting in *Paris*, 93 S.Ct. at 2649).

As a result of the Court's inability to formulate a satisfactory standard with predictable application to any given work, Justice Brennan stated, "there is no proba-

bility of regularity in obscenity decisions by state and lower federal courts." (Justice Brennan, dissenting in *Paris*, 93 S.Ct. at 2652).

B. Georgia has amalgamated the *Roth-Memoirs* test with *Miller*. On October 30, 1973, in *Slaton v. Paris Adult Theatre I*, ... Ga. ...., ... S.E.2d .... (Appendix AA to Appellant's Reply to Appellee's Motion to Dismiss or Affirm), the Georgia Supreme Court authoritatively set forth what is criminally obscene in Georgia. While it is not entirely clear that appellant herein was convicted under the said test, or that his conviction was affirmed thereunder, *amicus* assumes that the conviction and affirmance were in accordance with the guidelines articulated by the Georgia Supreme Court in the *Paris* case on October 30, 1973. On that assumption, the jury found (and the Georgia Supreme Court agreed) that, applying contemporary standards of the State of Georgia, and considering the film as a whole, the average person in the State of Georgia would find:

(a) that the predominant appeal of "CARNAL KNOWLEDGE" is to a prurient interest in sex; and

(b) "CARNAL KNOWLEDGE" is a patently offensive depiction or description of sexual conduct embodying a shameful or morbid interest in nudity or sex, and going substantially beyond customary limits of candor in the State of Georgia in describing or representing nudity or sex; and

(c) "CARNAL KNOWLEDGE", taken as a whole, lacks serious artistic, political or scientific values; and

(d) "CARNAL KNOWLEDGE", taken as a whole, is utterly without redeeming social value.

Initially, it should be observed that three of the seven Georgia Supreme Court Justices saw the film differently. Justice Gunter, dissenting, stated: "Having viewed this film with the other members of the Court, I must say, quite *subjectively* of course, that it is inconceivable to me that this work can be relegated to that area of . . . performing expression which falls outside of the protection of the First Amendment to the Constitution of the United States." (Jurisdictional Statement, Appendix A, 5) (emphasis added). Justice Gunter stated that his experience with this case taught him "that the MILLER majority's assumption that courts can distinguish commerce in ideas that is protected from commercial exploitation of obscene material that is not protected, is a too optimistic assumption. The instant case is the proof that is in the pudding; material is pornographic and unprotected in the subjective mind and senses of one judge; and that same material has serious literary or artistic value in the subjective mind and senses of another judge. . . ." (J.S., Appendix A, 12).

As noted above, the Georgia Supreme Court authoritatively construed its obscenity statute in *Slaton v. Paris Adult Theatre I*, ... Ga. ...., ... S.E.2d .... (Appendix AA to Appellant's Reply to Appellee's Motion to Dismiss or Affirm). Justice Gunter concurred reluctantly, and only because he felt bound by this Court's majority decisions in *Paris* and *Miller*. "Were it not for those two recent decisions", he said, "I would hold that the Georgia statute . . . which permits the State to suppress 'obscene materials' is vague and overly broad so as to be constitutionally unenforceable."

In Justice Gunter's view, the standards for identifying obscenity in Georgia failed to "come even close to

meeting the due process requirements" that the crime be "clearly defined by the State so that a reasonable man can see the line of demarcation between protected expression and suppressed expression." In Justice Gunter's view, a reasonable man "or, for that matter, seven supposedly reasonable judges utilizing objective criteria which in the last resort end up being really subjective criteria, cannot distinguish constitutionally protected material from material that is unprotected by the First Amendment. The net result of the MILLER (obscenity concept) case is that this Court acts as a seven-man board of censors in the State of Georgia, and the Supreme Court of the United States acts as a nine-man board of censors throughout the nation, with a majority of this Court determining what is constitutionally protected or unprotected in Georgia and a majority of the Justices of the Supreme Court of the United States determining what is constitutionally protected or unprotected at the national level."

Justice Gunter expressed a similar view dissenting in the case at bar, saying:

> "As the MILLER decision said, the history of the Supreme Court's obscenity decisions has been 'somewhat tortured'. . . . I would go one step further and say that the Supreme Court's decisions in this area, handed down during the recent and relatively short period of the First Amendment's entire history, have made it impossible for a dealer in such material to make a determination, with any degree of certainty, as to whether the material falls within the protection of the First Amendment or falls outside of its protection." (Appendix A of J.S. 5-6).

As noted above, the court below utilized the "prurient interest" test, the "patently offensive" test, the "utterly without redeeming social value" test, and the "serious . . . value" test to separate protected from unprotected speech. As *amicus* shows immediately below, however, these tests are essentially meaningless and intolerably vague.

1. Appeal to the "Prurient Interest" of the "Average Person".

The first test a trier of fact must utilize in Georgia is whether, applying contemporary Georgia standards, and considering the film as a whole, the average person would find its predominant appeal is to a prurient interest in sex. In *Miller*, Chief Justice Burger explained that the primary concern with requiring a jury to apply the "average person" test is to be certain that the prurient interest of the material "will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or indeed a totally insensitive one." (93 S.Ct. at 2620).[3]

The prurient interest test is the basic definition of what is obscene originally adopted by *Roth v. United States*, 354 U.S. at 487. Yet the Court has never provided even the slightest guidance regarding what is a

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[3]In the case at bar, an Albany jury, without evidence, was required to determine whether "CARNAL KNOWLEDGE" appealed to the prurient interest of the average person in the State of Georgia. It is almost certain that the jurors themselves were not a fair cross-section of the average person in the entire State of Georgia. See, *United States v. Roth*, 237 F.2d at 822 (Judge Frank, concurring). See also, *Williams v. Florida*, 399 U.S.78, 100-102. If the 12 jurors were not themselves "the average person" and they had no evidence of what appeals to the prurient interest of the average person, how could they find that "CARNAL KNOWLEDGE" did in fact appeal to the prurient interest of the average person in the State of Georgia, other than by guess, surmise or prejudice?

prurient sexual interest, as compared with other sexual interests which may be appealed to with full constitutional protection. All we know is that a "prurient" interest is different than a "sexual" interest. In *Roth v. United States,* 354 U.S.476, 487, the Court said: "[S]ex and obscenity are not synonymous. . . . The portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and mysterious motive force in human life has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern . . .".

The Court has attempted to define "prurient" on only one occasion—the 1954 *Roth* opinion—and its treatment could hardly have been more confusing. In that case, the Court said that material appeals to prurient interest if it has "a tendency to excite lustful thoughts." (354 U.S. at 487, n.20). The Court also said (quoting from *Webster's Dictionary*) that prurient was equivalent to "itching; longing; uneasy with desire or longing." (*Ibid.*) Finally the Court referred with approval to the Model Penal Code definition of prurient interest as "a shameful or morbid interest in nudity, sex, or excretion." (*Ibid.*)

It is reasonably clear that "lust" is not the same as "uneasy desire" or "longing". And, surely, none of these feelings is automatically equivalent to "shame" or "morbidity". For example, a film which would cause a married person to feel sexual longing or desire—even lust—for his or her spouse would certainly not also cause feelings of shame or morbidity if the marriage relationship was even remotely normal. Must a theatre owner exhibiting a film dealing with sex make sure that

the film does not arouse "lust", or cause "uneasiness or longing", or "shame or morbidity", in those who patronize his theatre? Must he make certain that his films do not cause *any* of these emotions, that they do not cause *all* of them at once, or what?

The court below (following the lead of this Court) repeats and relies upon the term "prurient", but it makes no attempt to describe which of these widely different reactions it means to include. If a theatre owner is warned not to exhibit films which appeal to a "prurient interest", he is entitled to, but does not get, "fair notice" and "concrete guidelines" as to what is meant by the term "prurient".

The lack of meaning and clarity in the concept of "pruriency" is, moreover, quite small in comparison to the utter impossibility of divining what will arouse the prurient interest (whatever that means) of the *average person*. The court below assumed that there is some widely shared (and therefore generally known) "average" societal reaction to certain types of sexual materials. But, as the case at bar demonstrates, this assumption is erroneous. "CARNAL KNOWLEDGE" was one of the most popular films in the year of its release. It was viewed by millions of persons who showed no sign of morbidity, shame, lust or sexual itching. Yet, the jury that convicted and four members of the court below, found that "CARNAL KNOWLEDGE" appeals to the prurient interest of the average person.

The National Commission on Obscenity and Pornography found as the result of numerous studies into the evaluation by Americans of extremely explicit sexual materials, that there was "very little consensus among people regarding either the 'arousingness' or the 'offen-

siveness' of a given sexual depiction. A wide distribution of judgments . . . occurs, for example, for depictions of female nudity with genitals exposed, for explicit depictions of heterosexual intercourse, and for graphic depiction of oral-genital intercourse. In addition, judgments differ among different groups: Males as a group differ from females . . .; the young differ from the old; the college-educated differ from those with only a high school education; frequent church attenders differ from less frequent church attenders." (*Commission Report*, p. 41). Put another way, "what may not be provocative to one person may well be to another." *Rowan v. Post Office Dept.*, 397 U.S.728, 737 (opinion for the Court by Chief Justice Burger).

Which then among these wholly different and widely shared present-day judgments about and reactions to the most extremely explicit sexual materials is the reaction of the of the "average person"? The fact is, of course, that there no longer is any consensus of "average" reaction to explicit sexual materials, if there ever was such consensus. Vastly differing tastes and reactions cannot be "averaged" like height or weight or family income.

In *Miller*, this Court recognized that, taking the Nation as a whole, "average" standards of taste and reaction regarding sexual materials, are "hypothetical and unascertainable". This vice of vagueness is not cured by authorizing the application of statewide, rather than national, standards. A State such as Georgia, whose leading city, Atlanta, is one of the most cosmopolitan in the world, and one of the most fast growing ones, contains as broad a spectrum of age, occupation, educational background, religious beliefs and nonbeliefs—and reactions to explicit sex as the Nation as a

whole. In *Miller v. California*, the Court correctly notes that "[p]eople in different States vary in their taste and attitudes", but tastes do not suddenly become uniform when one crosses a state border. People in the *same* State also vary in their tastes and attitudes. It is highly probable that residents of Atlanta, Georgia have more in common with the residents in New York City than they do with the residents of Albany, Georgia. The reactions of the "average" Georgian to a sexual depiction are thus as "hypothetical and unascertainable" as the reactions of the "average" American. A test for obscenity which requires a prediction as to whether the nonexistent sexually "average" Georgian will have a "prurient" reaction to a given sexual depiction provides neither "fair notice" nor "concrete guidelines".

What Justice Black said seven years ago of the "prurient interest" test is still true today, after *Miller*: "[I]t seems quite apparent to me that human beings serving . . . as judges or jurors, could not be expected to give any sort of decision on this element which would even remotely promise any kind of uniformity in the enforcement of this law. What conclusion an individual . . . would reach about whether the material appeals to 'prurient interest in sex' would depend . . . upon the [individual's] . . . personality, habits, inclinations, attitudes and other individual characteristics. . . . In the final analysis, the submission of such an issue as this to a judge or jury amounts to practically nothing more than a request from the judge or juror to assert his own personal beliefs about whether the matter should be allowed to be legally distributed. . . ." *Ginzburg v. United States*, 383 U.S.463, 478-479.

2. "Patently Offensive", in Light of "Contemporary Community Standards".

Under the formulation offered by the court below, films of sexual conduct which appeal to the "average", "prurient interest", are nonetheless constitutionally protected, unless they are, in addition, "patently offensive" in light of standards in the State of Georgia. But how is a threatre owner to know in advance whether the film he exhibits will be patently offensive to the community consisting of the State of Georgia? Does the community of Georgia find a work offensive within the meaning of the opinion of the court below, when a bare majority are repelled by it, when a substantial majority are repelled (say, 70% or 80%), or only when there is an overwhelming consensus of repulsion (say, 95%)?

And even if an answer were given to these questions, the overwhelming problem of vagueness would still lie in the necessity of determining, in advance, whether the requisite percentage of a given community will, in fact, be offended by a particular work, when the particular tastes and sensitivities of the members of that community cannot possibly be known to an exhibitor before he exposes himself to criminal liability. As noted above, in the discussion of the meaning of the "prurient" interest of the "average" person, all of the research carried out to date shows, contrary to what may have been assumed, that Americans are entirely unpredictable with regard to whether they find even the most "hard core" sexual depictions offensive or attractive and a substantial number do not take offense at any category of hard core depictions. In addition, an extensive national survey of American public opinion undertaken by the Obscenity Commission showed

that in 1970 approximately 50% of adults believed that it was "all right" to have any and all so-called hard core pornography available to adults who wish to read or view such materials privately. (*Commission Report*, 352-353). The materials to which this survey referred included pictures mainly for the purpose of showing sex organs, pictures of men and women having sexual intercourse, pictures of mouth-sex organ contact between men and women, pictures of homosexual activities, and even pictures of sex activities which include whips, belts or spankings. Where in this blanket approval by a majority of the consensual distribution of the most explicit materials is a theatre owner to find guidance about what particular film will actually offend the requisite percentage (whatever it is) of the community? In view of this data, it is clear that an exhibitor of a motion picture film is not afforded "fair notice" regarding the line between the obscene and the constitutionally protected, so long as obscenity is made to turn on the "community's" sense of offense.

Justice Black, dissenting in *Ginzburg v. United States*, 383 U.S. at 480, made this point, saying that even if there was agreement as to the relevant community pursuant to which the obscenity of material is to be judged, "who is capable of assessing 'community standards' on such a subject? . . . So here again the guilt or innocence of a defendant charged with obscenity must depend in the final analysis upon the personal judgment of attitudes of particular individuals and the place where the trial is held."

In *Winters v. New York*, 333 U.S.507, 514, this Court condemned as unconstitutionally vague a state statute which, as construed, measured the criminality of publications by invoking the "experience of the com-

munity as to what types of books are likely to bring about the corruption of public morals or other analogous injury to the public order".

3. The "Utterly Without Redeeming Social Value" Test and the "Serious Artistic . . . Value" Test.

A film which appeals to prurient interest and is patently offensive is nevertheless constitutionally protected under the Georgia test of obscenity, unless, additionally, it is found to be "utterly without redeeming social value" and lacking in "serious artistic . . . value". In *Miller*, the Court rejected the "utterly without redeeming social value" test as unworkable and ambiguous. Speaking of the "redeeming social value" test, Justice Black, dissenting in *Ginzburg*, 383 U.S. at 480, said:

> "This element seems to me to be as uncertain, if not even more uncertain, than is the unknown substance of the Milky Way. If we are to have a society as contemplated by the Bill of Rights, then I find little defense for leaving the liberty of American individuals subject to the judgment of a judge or jury as to whether material that provokes thoughts or stimulates desire is 'utterly without redeeming social value. . . .' Whether a particular treatment of a particular subject is with or without social value in this evolving, dynamic society of ours is a question upon which no uniform agreement could possibly be reached among politicians, statesmen, professors, philosophers, scientists, religious groups or any other type of group. A case-by-case assessment of social values by individual judges and jurors is, I think, a dangerous technique for government to utilize in determining whether a man stays in or out of the penitentiary."

The "serious artistic . . . value" test is, it is respectfully submitted, equally ambiguous and unworkable, or almost so. This Court has repeatedly had occasion to comment on the difficulty, if not the impossibility, of separating "serious" from "nonserious" communication for First Amendment purposes.

In *Stanley v. Georgia*, 394 U.S.557, 566, the Court, citing *Winters v. New York*, 333 U.S.507, stated that it is irrelevant "that obscene materials in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all." In *Winters v. New York*, 333 U.S. at 510, the Court rejected the suggestion that the constitutional protection for a free press applies only to the exposition of ideas. "Everyone is familiar with instances of propaganda through fiction. What is one man's amusement teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." See also, *Burstyn v. Wilson*, 343 U.S.495, 501; *Cohen v. California*, 403 U.S.15, 24, 26.

An illustration of the difficulty of separating protected from unprotected speech can be found in a recent event reported in the Los Angeles Times (Jan. 12, 1974). It appears that United States Secret Service agents took the printing plates and negatives of a cartoon by Paul Conrad which depicted $1.00 bills that carried the notation "$1.00 per gallon" and a caption that read "Administration's Gasoline Ration Stamps." The Secret Service said that the cartoons violated the

United States counterfeiting statute that forbids photographing or reproducing a likeness of United States currency, except for "newsworthy" purposes. The Secret Service agent in charge is quoted as saying: "[O]bviously . . . there's no intent to counterfeit", but added that the Government was concerned that if the plates "were stolen, lost or got into the wrong hands, they might be used elsewhere for the wrong purposes." At Secret Service headquarters in Washington, Spokesman John Murray is quoted as saying: "Obviously we're not looking to make a big issue of this thing. It is a violation of the law. What happens in most of these cases, we request the newspaper or magazine . . . . to cease from continuing to produce this. . . . The U.S. attorney in Seattle (where the cartoon had appeared in a local newspaper) brought the cartoon to our attention and said he felt it was a violation. We agreed with him and went out to Salt Lake City and retrieved the mats, plates and negatives." Paul Conrad is quoted as saying: "It's idiotic. I'll be happy to plead guilty if any one of the Treasury agents can go out and cash one."

Another illustration of the virtual impossibility of separating serious publications from nonserious ones is to be found in *Grigsby v. State,* Tennessee Court of Criminal Appeals, 14 Crim.Law.Rep. 2134 (Nov. 14, 1973), wherein, by a 2-1 decision, the court found "obscene" magazines containing many explicit photographs of intercourse, oral copulation, and the like. Judge Galbreath, dissented, saying: "I do not find the publications obscene, I have read them all and I enjoyed reading them. In spite of advancing years, global travels and extensive reading on the subjects dealt with, I learned much from many of the articles that I did not know before . . . many of which con-

tained informative and entertaining subjects I found to be of significant value. Other parts of the exhibits I found trite, boring and offensive to my personal tastes, but this did not lessen the value I found in the other portions nor my realization that many others would find these portions personally suitable to their tastes. I believe such literature has constitutional protection beyond our power to set aside."

The "proof" that serious and nonserious films cannot be separated by this Court's *Miller* test is to be found in the case at bar. As Justice Gunter said in his eloquent dissenting opinion: "The instant case is the proof that is in the pudding; material is pornographic and unprotected in the subjective mind and senses of one judge; and that same material has serious literary or artistic value in the subjective mind and senses of another judge. . . ." (J.S., Appendix A, 12).

In *Winters v. New York,* 333 U.S.507, 517, the Court, in declaring the New York statute there involved unconstitutionally vague, cited with approval *State v. Klapprott,* 127 N.J.L. 395, 22 A.2d 877, and quoted from the said case as follows:

> ". . . That the terms 'hatred,' 'abuse,' 'hostility,' are abstract and indefinite admits of no contradiction. When do they arise? Is it to be left to a jury to conclude beyond reasonable doubt when the emotion of hatred or hostility is aroused in the mind of the listener as a result of what a speaker has said? Nothing in our criminal law can be invoked to justify so wide a discretion. The Criminal Code must be definite and informative so that there may be no doubt in the mind of the citizenry that the interdicted act or conduct is illicit."

The Georgia statute, as authoritatively construed by the Georgia Supreme Court, is also "abstract and indefinite". A theatre owner, such as appellant herein, has no way of knowing in advance what film a jury might find appeals to the prurient interest of the average person; is patently offensive to the standards of the State of Georgia; is utterly without redeeming social value; and lacks serious artistic value.

C. Justice Brennan, dissenting in *Paris* (93 S.Ct. at 2652), spoke of "the awesome task of making case-by-case at once the criminal and constitutional law" in the area of obscenity. In the case at bar, the State argues that this awesome task should be placed in the hands of a jury, virtually without limitation. In its Motion to Dismiss or Affirm, appellee asserts that the jury found the film "CARNAL KNOWLEDGE" obscene by using its common sense. "Had appellant actually read the statutes, and given them the same common sense reading . . . he would have arrived at the obvious conclusion that they prohibit obscene material such as is here involved, to wit: the movie, 'Carnal Knowledge' " (p. 15). Appellee then argues that this finding is, for all practical purposes, final.

> "The intent of this Court, as enunciated in *Miller,* is clear: this Court will not reverse the jury's decision on the facts—and the question raised by appellant is one, purely and simply, of fact. . . . Any other decision by this Court, such as is urged by the appellant, says that the trial by jury, . . . becomes a superfluous, formal waste of time and money of the involved parties. Further, acceptance of appellant's position by this Court is clearly an adoption by this Court of the role of final review board for all of the several thousand new and po-

> tentially questionable films released each year. . . . Appellee would suggest that . . . this Court never meant to suggest that this role [of determining what is obscene] should be anything but that attributed to the jury" (pp. 24-25).

Appellee apparently has adopted the view first articulated by Judge Learned Hand in *United States v. Levine*, 83 F.2d 156, 157 (2 Cir. 1956). Judge Hand there stated that obscenity "is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premises, but really a small bit of legislation ad hoc. . . ." There can never be, he said, "constitutive principles for such judgments, or indeed more than cautions to avoid the personal aberrations of the jurors." (83 F.2d at 157).

In 1957, Judge Hand returned to the same theme. Speaking at the proceedings of the American Law Institute during the deliberation of Model Penal Code Tentative Draft No. 6, dealing with obscenity, Judge Hand said obscenity "cannot be defined", and he therefore objected to "an attempt to define the indefinable" (34 A.L.I. Proceedings, 191 [1957]). Judge Hand concluded that

> "we must not try to be definite. We must leave it to the jury to say, is this obscene? Is it contrary to what you all think ought not to be? . . . The attempt to mix in with this an objective standard . . . seems to me to be absurd." (*Id.* 192).

While it may be that a jury can "legislate" in this area better than a judge, it is surely a denial of due process, and the functional equivalent of an *ex post facto* law, to subject an accused to criminal punish-

ment under "legislation" enacted by the jury that convicts a defendant. See, *Bouie v. City of Columbia*, 378 U.S.347; *Douglas v. Bouder*, 93 S.Ct.2199; *Rabe v. Washington*, 405 U.S.313. See also, Justice Black's dissenting opinion in *Ginzburg v. United States*, 383 U.S. 463, 478, 480. Justice Brennan, dissenting in *Paris* (93 S.Ct. at 2657), stated that while turning the question of obscenity over to the jury would lighten the burden of this Court in dealing with such cases,

> "it would neither offer nor produce any cure for the . . . vices of vagueness. Far from providing a clearer guide to permissible primary conduct, the approach would inevitably lead to even greater uncertainty and the consequent due process problems of fair notice. And the approach would expose much protected, sexually oriented expression to the vagaries of jury determinations. Cf., *Herndon v. Lowry*, 301 U.S.242, 263 (1937). Plainly, the institutional gain would be more than offset by the unprecedented infringement of First Amendment rights."

Justice Douglas, dissenting in *Miller*, said (93 S.Ct. at 2624):

> "In *Bouie v. City of Columbia*, 378 U.S.347, we upset a conviction for remaining on the property after being asked to leave, while the only unlawful act charged by the statute was entering. We held that the defendants had received no 'fair warning, at the time of their conduct' while on the property 'that the act for which they now stand convicted was rendered criminal' by the state statute. *Id.*, at 355. The same requirement of 'fair warning' is due here, as much as in

Bouie. The latter involved racial discrimination; the present case involves rights earnestly urged as being protected by the First Amendment. In any case—certainly when constitutional rights are concerned—we should not allow men to go to prison or be fined when they had no 'fair warning' that what they did was criminal conduct."

In *Bouie*, the Court held that where vague statutes are concerned the vagueness cannot "be cured in a given case by a construction in that very case placing limits on the statute." As the Court pointed out, one of the vices of a vague statute is that it gives inadequate guidance to the individual whose conduct is regulated. This vice cannot be cured retrospectively by a ruling of the trial court. Where a court engages in *ad hoc* legislation and, at the same time, seeks to impose punishment for a person for violating this legislation, the defendant has been subjected to the functional equivalent of an *ex post facto* law, in violation of the Due Process Clause. See also, *Douglas v. Bouder*, 93 S.Ct. 2199. This is equally true where a jury engages in *ad hoc* legislation.

II

To Subject an Exhibitor of Motion Picture Films to Criminal Prosecution for Exhibiting an "Obscene" Film Prior to the Time That There Has Been a Judicial Determination of Its Obscenity Is a Denial of Due Process of Law.

"Georgia case law permits a civil injunction of the exhibition of obscene materials," *Paris Adult Theatre I v. Slaton* (93 S.Ct. at 2633), before initiating criminal proceedings. Commenting on this civil procedure, the Court said: "[S]uch a procedure provides an exhibitor

. . . the best notice prior to any criminal indictment, as to whether the materials are unprotected by the First Amendment and subject to state regulation." (93 S.Ct. at 2634).

In *Miller*, Justice Douglas, dissenting, concluded that a prior determination of obscenity was constitutionally required to satisfy the "fair notice" requirement of the Due Process Clause. After commenting on the difficulty the Court has had trying, unsuccessfully, to define obscenity, he asserted that obscenity could not be defined because it deals with subjective matters of taste. "What shocks me may be sustenance for my neighbor. What causes one person to boil in rage over one pamphlet or movie may reflect only his neurosis, not shared by others. . . . Obscenity cases usually generate tremendous emotional outbursts. They have no business being in the courts. . . . Under the present regime—whether old standards or the new ones are used—the criminal law becomes a trap." (93 S.Ct. at 2624). Justice Douglas concluded that

> "until a civil proceeding has placed a tract beyond the pale, no criminal prosecution should be sustained. . . . In any case—certainly when constitutional rights are involved—we should not allow men to go to prison or be fined when they had no 'fair warning' that what they did was criminal conduct." 93 S.Ct. at 2624).

If a specific book has been condemned as obscene in a civil proceeding, and thereafter a person distributes that particular work, then, Justice Douglas stated, "a vague law has been made specific." (93 S. Ct. at 2624). A criminal prosecution brought at that juncture

> "would not violate the time-honored void-for-vagueness test. . . . Obscenity—which even we cannot define with precision—is a hodge-podge. To send men to jail for violating standards they cannot understand, construe and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process" (93 S.Ct. at 2625).

In 1966, Justice Black, dissenting in *Ginzburg v. United States,* 383 U.S.463, also addressed himself to the question of a prior adversary hearing with regard to the obscenity of challenged material, in light of the inherent vagueness of the crime of obscenity.

> "[E]ven if . . . this country is far along the way to a censorship of the subjects about which the people can talk or write, we need not commit further constitutional transgressions by leaving people in the dark as to what literature or what words or what symbols if distributed through the mails make a man a criminal. As bad and obnoxious as I believe governmental censorship is in a Nation that has accepted the First Amendment as its basic ideal for freedom, I am compelled to say that censorship that would stamp certain books and literature as illegal in advance of . . . conviction would in some ways be preferable to the unpredictable book-by-book censorship to which we have now drifted." (383 U.S. at 481).

The same day *Roth* was decided, the Court in *Kingsley Books, Inc. v. Brown,* 354 U.S.436, commented on the due process advantages of a prior civil determination on the question of obscenity before initiating criminal prosecutions. Justice Frankfurter, speaking for the

Court upholding the New York civil procedure for determining obscenity, stated:

> "Instead of requiring the bookseller to dread that the offer for sale of a book may, without prior warning, subject him to a criminal prosecution with the hazard of imprisonment, the civil procedure assures him that such consequences cannot follow unless he ignores a court order specifically directed to him for a prompt and carefully circumscribed determination of the issue of obscenity. Until then, he may keep the book for sale and sell it on his own judgment rather than steer 'nervously among the treacherous shoals.' Warburg, Onward And Upward With The Arts, The New Yorker, April 20, 1957, 98, 101, in connection with R. v. Martin Secker Warburg, Ltd., [1954] 2 All Eng.683 (C.C.C.)." (354 U.S. at 442).

In *Delta Book Distributors, Inc. v. Cronvich*, 304 F. Supp. 662 (E.D. La. 1969), vacated on other grounds *sub nom. Perez v. Ledesma*, 401 U.S.82, a three-judge court also came to the conclusion that a prior adversary hearing was constitutionally required before criminal proceedings were initiated for the violation of a state obscenity statute. The Court observed, in accordance with this Court's prior rulings, that constitutionally protected expression is separated from obscenity "only by a dim and uncertain line" and that any attempt to make it a crime for the circulation of allegedly obscene material "must be closely scrutinized to the end that protected expression is not abridged in the process". (304 F.Supp. at 666). After stating that prior restraint upon the exercise of First Amendment Rights can be exerted through seizure or arrest of the alleged

offender, the court went on to say that since obscenity was not protected by the First Amendment criminal proceedings could be brought, but only if safeguards were taken to minimize the impingement upon the exercise of First Amendment rights. The court concluded that the obscenity statutes might

> "have to incorporate provisions immunizing alleged violators from criminal liability for any activities occurring prior to an adversary judicial determination of the fact of obscenity. Applying these principles . . . the arrests . . . are clearly invalid for lack of a prior adversary determination of the obscenity of the material upon which the arrests . . . were based." (304 F.Supp. at 667).

At least one State—Alabama—has sought by legislation to give an accused fair warning before initiating criminal prosecution for the circulation of "obscenity". See, Ala. Code, Title 14, §§ 374(16j)-(16o) (Supp. 1971). Chapter 64C of the Alabama obscenity statute provides that, prior to the commencement of a prosecution, one of several governmental officials must serve upon an exhibitor "prior written notice that there is reasonable cause to believe that the material" in question is in violation of the obscenity statute. Ala. Code, Title 14, § 374(16m)(a) (Supp. 1971). Then, the person receiving notice has thirty days within which "to file an appropriate action for declaratory judgment to determine the validity of such written notice." Ala. Code, Title 14, § 374(16m)(c) (Supp. 1971). It is true that this statute was declared unconstitutional by a three-judge district court, but only because the Alabama procedure did not conform with the rigorous requirements set forth by this Court where the State engages

in censorship activities. In *United Artists Corp. v. Wright, et al.*, ... F.Supp....., United States District Court for the Middle District of Alabama, Northern Division, Civil No. 4208-N (Jan. 5, 1974),[3] the court stated that while a system of prior restraints is not necessarily invalid such restraints must be hedged about with adequate procedural safeguards. The three-judge court mentioned three such safeguards:

(a) Initially, the court repeated the teachings of this Court that when a system of prior restraints is used by the Government to control speech or press, the burden of proving that the material is unprotected must rest upon the censor. The court concluded that the Alabama statute failed this test, saying:

> "Under the Alabama statute, the burden is clearly upon the individual and not the government; when the statutory warning is given, the state need have only 'reasonable cause' to believe that the material is obscene. Thereafter, if the exhibitor wishes to obtain a definitive ruling from a court, he himself must bring suit and carry the burden of proof. ALA Code, tit. 14, § 374(16m) (c) (Supp. 1971). . . ."

(b) The court also found that the Alabama statute was infirm because it violated the rule of *Freedom v. Maryland*, 380 U.S.51, 58-59, that the procedures of censorship may not constitutionally lend an air of finalty to the action of the censor.

> "Under the procedural system of this [Alabama] statute, the decision of the official giving notice is for all practical purposes a final decision.

[3]The unreported opinion of the court is attached hereto as Appendix A.

> The issuance of the warning effectively stops the showing of the film. The state is not required under the Alabama statute to go to court to obtain an injunction after adjudication. The warning is for all intents and purposes a 'final' act of censorship and, therefore, invalid."

(c) Finally, the court concluded that the Alabama statute was unconstitutional because it failed to provide for a prompt final judicial decision.

> "Nowhere in the Alabama statute is there a provision for expedited judicial consideration, ei- provision for expedited judicial consideration, either at trial or on appeal, of the issue of obscenity. authoritative judicial decision of the State of Alabama providing for expedited consideration of civil adjudications of obscenity *vel non* under this statute. Such an adjudication is, therefore, liable to all of the delays which are incident to the bringing of an ordinary civil action. This failing renders the Alabama statute invalid in that respect."

Amicus would add a fourth safeguard to the three mentioned by the court in *United Artists Corp. v. Wright. Amicus* believes that an exhibitor should have the right to have the film he exhibits judged by a jury. This is a view which Justice Brennan has always held. Dissenting in *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, Justice Brennan, speaking of the New York obscenity statute there involved, stated:

> "I believe the absence in this . . . obscenity statute of a right to jury trial is a fatal defect. * * * The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of ob-

scenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards. A statute which does not afford the defendant, of right, a jury determination of obscenity falls short, in my view, of giving proper effect to the standard fashioned as the necessary safeguard demanded by the freedoms of speech and press for material which is not obscene. . . ." (354 U.S. at 447-448).

In *Times Film Corp. v. City of Chicago*, 365 U.S.43, 68-69, Chief Justice Warren, dissenting, said of the censorship statute there involved: "The inexistence of a jury to determine contemporary standards is a vital flaw." Mr. Justice Stewart, while a judge of the Court of Appeals, stated in *Volanski v. United States*, 246 F.2d 842, 845 (6 Cir. 1957), that the question of obscenity "is peculiarly one best left for *nisi prius* determination, preferably by a jury." In *Miller*, this Court also emphasized the special importance of a jury in obscenity cases.

History, it is respectfully submitted, demonstrates the need to have a jury pass upon a film which is charged with being obscene, and not fit to be seen by consenting adults. In England, freedom of speech and press was linked, among other things, with the issue of the right of juries to determine whether particular publications should be suppressed. Fox's Libel Act of 1792 while in terms procedural, transferring from the judge to the jury the power of saying whether any specific writing was a seditious libel, in actuality "placed the decision

in the hands of twelve men whose views were more likely to be representative of general opinion than would be judges and lawyers who perforce had studied the sweeping assertions of the older law cases—which were often relics of Stuart and Star Chamber days." Taswell-Langmead, *English Constitutional History* (11th ed., 1960) 667.

The trials of Wilkes and the printers of the "North Briton"; the prosecution of Wilkes for his "Essay on Woman", found to be an "obscene and impious libel"; the trial of Junius for his celebrated letter to the King; the trial of Thomas Paine *in absentia*, with his historic defense by Erskine; the trial of John Horne for libelling the King's troops in America by calling them murderers; the trials of the Dean of St. Asaph and of Stockdale for the publication of "seditious" pamphlets—all of these cases were monstrous examples of how liberty of the press can be subverted when the jury is deprived of its power to decide. "Trial by jury was the sole security for freedom of the press; and it was found to have no place in the law of England." 2 May, *Constitutional History of England* (Holland ed., 1912) 11.

The change in the law of England at the close of the eighteenth century, as exemplified by Fox's Libel Act, was made necessary by the insistent demand of the people for the right of juries to render general verdicts in all libel cases.

> "It was realized that, if the functions of the jury in a prosecution for libel were enlarged, . . .; if, in other words, they had the right to give a general verdict upon the whole matter; there would be abundant security that the law would be so administered that it harmonized with the political

ideas and the public opinion of the day." X Holdsworth, *History of English Law* (Lond., 1938) 673.

In the debates in the Commons prior to the passage of the Libel Act, it became clear that the real issue was whether the juries or the judges were the best tribunal to decide the question of libel or no libel. Stated one member of the House:

> ". . . it depends solely on the opinion which is entertained of the libel by the public. . . . What passed in the Roman Senate for polite raillery, would in this House be deemed a gross affront, and be perhaps attended with bloodshed. . . . So changeable is the nature of a libel, so much does it assume the chameleon, and suit its colour to the complexion of the times! In short its libellous quality is founded entirely on popular opinions. There is no other standard by which it can be measured or ascertained. Who then, so proper as the people to determine the point?"
>
> Quoted in X Holdsworth, *supra*, at 689.

When the Libel Act was passed, Lord Macauley praised "the inestimable law, which places the liberty of the press under the protection of juries." 2 May, *Constitutional History of England* (Holland ed., 1912) 18, fn. 3. Moreover, Thomas Erkskine's fame was premised upon his courageous defense in the eighteenth century of "the liberty of the press and the rights of juries". 2 May, *supra*, at 16. Almost one hundred years later, a noted English lawyer was to say: "Take, for instance the freedom of the press. This, which we justly prize as one of the first of social blessings, is

chiefly indebted to the jury for its vigorous existence". Forsyth, *History of Trial by Jury* (2d ed., 1878) 364.

Early American history also sheds light on the issue here involved. "The close relations between the Zenger trial and the prosecutions under George III in England and America is shown by the quotations on reprints of the trial and the dedication of the 1784 London edition to Erskine, as well as by reference to Zenger in the discussions preceding the First Amendment." Chafee, *Freedom of Speech* (1920) 23. From the viewpoint of the liberal colonists in America in the early 1700's, "freedom of the press involved both absence of previous restraint and the right to a jury trial". I Government and Mass Communications (1947) 71. Professor Chafee was thus led to observe ". . . a jury trial for restrictions on the sale of books is probably required by both sound policy and the constitutional guaranty of freedom of the press." *Free Speech in the United States* (1941) 539. Support for this view comes also from a noted student of American constitutional history. "Those who framed the First Amendment placed great emphasis upon the value of a jury of citizens in checking government efforts to limit freedom of expression." Emerson, *The Doctrine of Prior Restraint* in 20 L. and Cont. Prob. 648, 657 (1955).

It should be recalled that many issues of the New York Weekly Journal published by Zenger were first "burnt by the hands of the common hangman" before Zenger was indicted for publishing "false, scandalous, malicious and seditious" publications. *The Trial of John Peter Zenger (1734) and The Freedom of the Press*, prepared by the Works Projects Administration (1940) iii. See also, 17 Howell's State Trials 675 (Lond. 1813). In his argument to the jury, Andrew

Hamilton pointed out that one of the reasons for the abolition of the court of Star Chamber was that "the people of England saw clearly the danger of trusting their liberties and properties to be tried, even by the greatest men in the Kingdom, without the judgment of a jury of their equals" *id.*, at 47. Hamilton urged that "jurymen are to see with their own eyes, to hear with their own ears, and to make use of their own consciences and understandings, in judging of the lives, liberties or estates of their fellow-subjects" *id.*, at 49. And on the occasion when Mr. Hamilton was presented with the Freedom of New York after the acquittal of Zenger, the scroll presented to him by the common-council extolled "his learned and generous defense of the rights of mankind, and the liberty of mankind, and the liberty of the press" *id.*, at 58.

When, in 1789, James Madison rose to address the first House of Representatives, he urged upon the House certain proposed amendments to the Constitution which would "expressly declare the great rights of mankind secured under this Constitution". 1 Annals of Congress (1834) 432. Madison stated that the great mass of the people who opposed the Government created by the Constitution "disliked it because it did not contain effectual provisions against the encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power" (*id.*, at 433). Thus, Madison proposed the following amendment, among others: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable" *id.*, at 434.

Madison pointed out that the policy of Great Britain in establishing a declaration of rights was not applicable to America. In England, a barrier had been raised against the power of the Crown, but the power of the Parliament "is left altogether indefinite" *id.*, at 436. Even Magna Charta, Madison observed, contained no provision for the "great rights, the trial by jury, freedom of the press, or liberty of conscience" *id.*, at 436. In the United States, stated Madison, the case was different. Barriers against power "in all forms and departments of Government" had been raised *id.*, at 436.

Madison affirmed "Trial by jury cannot be considered as a natural right, but a right resulting from a social compact, which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature" *id.*, at 437. He warned that "the State Governments are as liable to attack these valuable privileges as the General Government is, and therefore ought to be as cautiously guarded against" *id.*, at 441.

Thus, the confluence of English and American history bear witness to the essential interrelationship between trial by jury and freedom of the press. The First Amendment was intended to prevent not merely the censorship of the press, but "any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." *Grosjean v. American Press Co.*, 297 U.S.233, 249-250.

Amicus, in urging that a jury trial is constitutionally mandated in obscenity proceedings, is not to be under-

stood as conceding that any film should be at the mercy of a vote of the "common consensus of the community". *Amicus* believes that one's right to freedoms of speech and press should "not be submitted to vote; they [should] depend on the outcome of no elections". *West Virginia State Bd. of Education v. Barnett*, 319 U.S.624, 638-639. So long, however, as the exhibition of films dealing with sex depends upon current community notions of what is acceptable, it is submitted that jury trial and jury determination are integral to such standards.[4]

To paraphrase what Justice Black said, dissenting in *Ginzburg v. United States*, 383 U.S.463, 481, as bad and obnoxious as *amicus* believes government censorship to be in a Nation that has accepted the First Amendment as its basic ideal for freedom, *amicus* is compelled to say that censorship that would stamp certain films as illegal in advance of exhibition or conviction would be preferable to the unpredictable film-by-film censorship which now exists, and pursuant to which law-abiding citizens are sent to jail without fair notice or concrete guidelines as to what is obscene. Additionally, *amicus* believes that censorship, with the

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[4] *Amicus* recognizes that "a particular jury may voice the 'moral sentiments' of a generation ago, not of the present" (*United States v. Roth*, 237 F.2d 796, 822 [2 Cir. 1956], Judge Frank dissenting). *Amicus* also recognizes the fact that "no statistician would conceivably accept the view of a jury—twelve persons chosen at random—as a fair standard on community attitudes on such a subject of obscenity." (*Id.*) *Amicus* is also painfully aware of the warning sounded in *United States v. Klaw*, 150 F.2d 155 (2 Cir. 1955), against the dangers of leaving final authority in jurors to determine what is obscene. *Amicus* agrees with the statement in *Klaw* that unless the jury is tightly controlled and supervised, "a witch hunt might well come to pass which would make the Salem tragedy fade into obscurity." (350 F.2d at 170).

protection of a lay jury, is not as bad and obnoxious as censorship by a judge sitting alone.

If, then, we are to embark upon a form of censorship of what willing adults may view, let there at least be the "fair warning" of a prior judicial decree of what is to be censored. A film exhibitor should not be forced to be both a censor and a defendant in a criminal case.

III

The Constitutional Status of Allegedly Obscene Expression Requires, as a Minimum, Determination on the Basis of Both the Area of the State and the Geographic Area From Which the Jury Is Drawn.

In *Miller*, this Court rejected a "national" standard of First Amendment protection as a limit upon state obscenity prosecutions. It was held that the Court could not be reasonably expected to articulate a single formulation "for all 50 States" (93 S.Ct. at 2618). Thus, in *Miller*, a requirement that the jury evaluate the materials with reference to "contemporary standards of the State of California" was held constitutionally adequate (93 S.Ct. at 2620). It was stated: "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." (93 S.Ct. at 2619).

Moreover, in *Miller* this Court emphasized the inherent dangers of undertaking to regulate any form of expression, stating that "State statutes" designed to regulate obscene materials must be carefully limited. It was stressed that conduct must be specifically defined by the "applicable state law, as written or authoritatively construed". Examples of "state laws" directed at de-

piction of defined physical conduct were given in the opinion. The Court held that other "state formulations" could be equally valid in this respect, and that other existing "state statutes, as construed heretofore or hereafter," may be adequate (93 S.Ct. at 2614-2615, n.6).

Amicus submits that the governing rule should be, first, that if expression does not substantially exceed the standards of the State, then such expression is plainly entitled to constitutional protection. However, consistent with the requirements of the First Amendment and the premises of the discussion in *Miller*, a local community should not be deprived of any expression which does not offend the standards of the local community and is accepted and tolerated by the particular locality. In short, material should not be suppressed as obscene unless such material not only offends state standards, but also the standards of the geographic area from which a particular jury is drawn.

The discussion which follows is therefore divided into two sections: the first, that the standards for judging obscenity must be measured by a state standard,[5] as opposed to a "local community" standard; and the second, that even if state standards are exceeded, it should still be open to the accused in an obscenity prosecution to show a broader toleration by the local community.

A. With respect to the initial requirement that a state standard be the governing standard, the following considerations should be noted.

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[5]In this case, by the standards of the State of Georgia. This appears to be the view of the Supreme Court of Georgia in *Slaton, et al. v. Paris Adult Theatre I, et al.*, unreported, No. 26631, de-

(This footnote is continued on next page)

According to the 1970 Census, there are approximately 3,071 counties in the nation. World Almanac, 1973, published by Newspaper Enterprises Association, pp. 189-206. There are approximately 7,200 incorporated cities, villages, boroughs and towns with a population of 2,500 or more in the country. World Almanac, 1973, pp. 152-188. This figure is exclusive of rural areas and unincorporated places. Another breakdown by the 1970 United States Census indicates that there are 8,863 incorporated places with a population of 1,000 or more; 9,803 places with a population of less than 1,000; and 2,102 unincorporated places with a population of 1,000 or more. There are 153 cities with a population of over 100,000. World Almanac, 1973, pp. 136-137. There are 264 large metropolitan areas which contain a central city of 50,000 or more inhabitants, together with such adjacent counties as are functionally integrated with the central city. World Almanac, 1973, pp. 142-143; 405 Annals of the Academy of Political and Social Science, "Urban Change and the Planning Syndrome", 9 (Jan. 1973).

The Director of the Bureau of the Census, Social and Economic Statistics Administration, United States Department of Commerce, states:

> "Americans live in 20,768 recognized places across the country, of which 18,666 are incorporated—6,790 cities, 6,116 towns, 4,531 villages, and 1,229 boroughs. Illinois has the largest number of incorporated places with 1,263; Rhode Island the least with eight.
>
> "The census shows that 9.2% of the population lives in cities of 1,000,000 or more; 6.4% in

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cided October 30, 1973, a ruling seemingly contradictory to the conclusion reached by the same Court in the case herein.

places of 500,000 to 1,000,000; 12.2% in places of 100,000 to 500,000; 17% in places of $25,000 to 100,000; and 20.9% in places of 2,500 to 25,000. Another 7.8% lives in areas classified as urban because of their proximity to large places or their population density. The rural population includes the 5.2% of the total population who live in places of less than 2,500, and 21.3% who live in open country." World Almanac, 1973, p. 132.[6]

If each of the thousands of local subdivisions in the country were permitted to infringe on constitutional freedoms by their own subjective standards, the fundamental postulates of a self-governing society as guaranteed by the provisions of the First and Fourteenth Amendments would be plainly undermined. If the survival of the nation depends upon an enlightened and informed citizenry, it is plain that the judgment of acceptability and tolerance of expression cannot be made dependent upon the subjective predilections of local bodies of the counties, cities, villages and townships throughout the country. The variant operations of police officers, prosecuting officials, censorship bodies, and private censorial groups demonstrate that the adoption of a "Balkanized" standard for judging alleged obscene expression would only result in the censorship of literature and the arts for the entire State by dictates of local communities.

This Court has stated that it is "vital that the standards of judging obscenity safeguard the protection of freedom of speech and press for material which does

[6]It should also be noted that there are 159 counties in the State of Georgia, alone. World Almanac, 1973, pp. 191-192.

not treat sex in a manner appealing to prurient interest". *Roth v. United States*, 354 U.S.478, 488. In *Heller v. New York*, 93 S.Ct.2789, and *Roaden v. Kentucky*, 93 S.Ct.2796, this Court repeatedly referred to books, films or other materials "presumptively protected under the First Amendment". Since it is only "obscenity" that is excluded from the constitutional protection, the question of whether a particular work is obscene necessarily implicates, therefore, a First Amendment question.

The issue here is not one affecting only an isolated group of citizens in the State, but is one involving the concerns of people, generally,—the right to freedom of expression and the right of the people to know—and it is essential that a statewide standard be used in judging whether or not particular expression is entitled to constitutional protection. Where the subject under consideration is the First Amendment guarantees, uniform treatment throughout the State is required. Much confusion and uncertainty would result if each of hundreds of localities were to enforce different standards with respect to the right to exercise freedom of expression. Such a "watered-down version of constitutional rights" by a multiplicity of divergent regulations by municipalities would entail the most harmful consequences to constitutional guarantees. *Garrity v. New Jersey*, 385 U.S.493, 500. "There are village tyrants as well as village Hampdens." *West Virginia State Board of Education v. Barnett*, 319 U.S.624, 638. Publishers and producers of films and other media of communication cannot be expected to create prints of films to satisfy police officers, prosecuting officials, censorship boards, and private censorial groups in the 159 counties of the State of Georgia, to give only one exam-

ple. Each "local community" under such circumstances would censor literature and the arts for the entire State.

Any restriction on the right of citizens to freely express themselves, and the right of the public to know, must have at the very least a state justification; it cannot depend for its validity upon the capriciousness or whim of a "local community".

B. *Amicus* does, however, urge the Court to recognize the additional requirement that material should not be suppressed as obscene unless such material not only offends state standards, but also the standards of the geographic area from which a particular jury is drawn. A requirement that the applicable standards in determining the alleged obscenity of expression be the area from which the jury is drawn has already been enunciated by one court. *Richards v. State*, 497 S.W.2d 770, 777 (Texas. Ct. Civ. App., July 2, 1973). As heretofore stated, Chief Justice Burger, in *Miller*, recognized that public depiction of conduct might be "found tolerable in Las Vegas, or New York City" (93 S.Ct. at 2619).

In the naturalization field, where questions of free speech and press are not even involved, the courts accept the view that "in order to determine whether a petitioner has met his burden of establishing that he is a person of good moral character . . . we should see if the petitioner's character coincides with the generally accepted mores or standards of the average citizen of the community in which the petitioner resides . . . If the petitioner's conduct fails to satisfy the community test, then we should see whether the 'common conscience', when it is possible of being ascertained, of the community as a whole also looks disfavorably upon

such conduct". *In re Mayalls Naturalization*, 154 F. Supp. 556, 560 (E.D. Pa. 1957) (opinion by Chief Judge Ganey); see also, *In re Naturalization of Spak*, 164 F.Supp. 257, 259-260 (E.D. Pa. 1958).

Two important considerations coalesce here, *amicus* submits, to support the conclusion that the constitutional status of allegedly obscene expression should be determined on the basis of both state standards and the standards of the geographic area from which the jury is drawn. In the first place, the decisions rendered by this Court on June 21, 1973, placed heavy reliance upon "the jury system" (*Miller v. California*, 93 S. Ct. at 2616). The Court has relieved the prosecution from the introduction of any expert witnesses (*Kaplan v. California*, 93 S.Ct. at 2685), and while permitting the defense the opportunity to introduce expert evidence, has decried the use of expert testimony in all obscenity prosecutions upon the ground that "no such assistance is needed by jurors" (*Paris Adult Theatre I v. Slaton*, 93 S.Ct. at 2634, n. 6). In short, this Court has in effect made the jury in an obscenity prosecution a small "*ad hoc* legislature" and has left it to the jury, as representatives of the area from which the jury is drawn, to enact whether or not a particular expression is entitled to constitutional protection.

If, then, a jury drawn from a particular geographic area, and assumedly representative of the members of the community in that area, are of the view that particular material does not offend the standards of the community, in the light of First Amendment guarantees it is submitted that the community should have its way and be permitted to view and see and hear what the community has deemed tolerable. This Court has

stated, with respect to a case involving First Amendment guarantees:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. Schneider v. State of New Jersey, 308 U.S.147, 60 S.Ct.146, 84 L.Ed.155; Cantwell v. Connecticut, 310 U.S.296, 60 S.Ct. 900, 84 L.Ed.1213, 128 A.L.R.1352; Prince v. Massachusetts, 321 U.S.158, 64 S.Ct.438. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standards governs the choice." *Thomas v. Collins*, 323 U.S.516, 529-530.

Since "obscenity" is a limitation on the right of the public to access to constitutionally protected material, it is the character of the right, and not the limitation, which determines application of a constitutional standard. In short, we are committed to the broadest application of First Amendment guarantees and the narrowest limitations upon the exercise of the freedoms protected by the Amendment.

If the aim of self-government, based upon the broadest exercise of freedoms of speech and press, is to be achieved, the diversity among communities should be reconciled with the demands of the First Amendment. The rule, it is submitted, should be that if expression

does not substantially exceed state standards, then such expression is plainly entitled to constitutional protection. However, local communities may permit a broader area of freedom of expression than even that which the First Amendment assumedly protects. The standard suggested by *amicus* will protect expression from the vagaries of local censorship and political opportunism, while at the same time assuring the First Amendment guarantees to the entire State as well as to particular communities in the State.

IV

The Court Should Clarify the Scope of the Area of Ideas Protected by the First Amendment. The Right of Individuals to Express, and the Right of the Public to Receive, Informational, Educational or Entertaining Ideas May Not Be Constitutionally Abridged.

A. While placing "obscenity" outside the pale of constitutional protection, the majority opinion in *Miller* stressed the importance of protecting all ideas—"good or bad, sound or unsound" (93 S.Ct. at 2621). The *Miller* opinion opined that the "stern 19th century American censorship" did not limit or affect "expression of serious literary, artistic, political, or scientific ideas". It was stated that courts would be able to "distinguish commerce in ideas, protected by the First Amendment, from commercial exploitation of obscene material" (93 S.Ct. at 2607). Pointing to the language in *Roth*, the opinion quoted: "The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people." (93 S.Ct. at 2620-2621) (Court's emphasis).

Amicus respectfully submits that the Court should make clear that the phrase "literary, artistic, political or scientific" was not intended to delineate strict categories of ideas which alone are protected by the provisions of the First Amendment. Such hardening of the categories would run counter not only to history and the basic postulates of our democratic society, but also to the plain provisions of the First Amendment and a host of interpretive decisions of the Amendment by this Court.[7] Whatever limits there may be on the minds of men, it is submitted that they cannot include the multifold and multifarious *ideas* which the intellect and imagination engender. The opinion of Mr. Justice Harlan in *Cohen v. California,* 403 U.S.15, deserves careful consideration on this issue:

> ". . . The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests . . . We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why '[w]holly

[7]Apart from the issue of separation of church and State, and freedom of conscience, it can hardly be contended that the expression of religious ideas is unprotected.

neutral futilities * * * come under the protection of free speech as fully as do Keats' poems or Donne's sermons,' Winters v. New York, 333 U.S.507, 528, 68 S.Ct.665, 676, 92 L.Ed.840 (1948) (Frankfurter, J., dissenting), and why 'so long as the means are peaceful, the communication need not meet standards of acceptability.' . . .

"Additionally, we cannot overlook the fact, because it is well illustrated by the episode involved here, that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated. Indeed, as Mr. Justice Frankfurter has said, '[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.'" (403 U.S. at 24-26).

B. The reason that the Constitution gives broad protection to the dissemination of ideas has been variously stated. Justice Cardozo said in *Palko v. Connecticut*, 302 U.S.319, 327: "Of that freedom [of thought and speech] one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom

. . ." In *Thomas v. Collins,* 323 U.S.516, 529, Justice Rutledge wrote of "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment". Even such a critic of the "preferred position" as Justice Frankfurter acknowledged that First Amendment guarantees "come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements". *Kovacs v. Cooper,* 336 U.S.77, 95.

The premises upon which the aforesaid conclusion rests have been elucidated in four distrinct, but cognate, ways. The first recognizes that freedom of expression is plainly important for the enhancement of human dignity, a means of assuring individual self-fulfillment. "The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed." *Cantwell v. Connecticut,* 310 U.S.296, 310. As Professor Emerson has stated: "Hence suppression of belief, opinion, or other expression is an affront to the dignity of man, a negation of man's essential nature." Emerson, *The System of Freedom of Expression* 6 (1970).

A second ground for justifying the high position afforded freedom of expression in our constitutional system is exemplified in the statement by Justice Holmes in his dissenting opinion in *Abrams v. United States:*

> "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believed the very foundations of their own conduct that the ultimate good de-

> sired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, . . . That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment." 250 U.S.616, 630.

It is of course important to note, as a corollary to this utilitarian philosophy, that the "market place" is not a place where goods are being marketed. Ideas cannot be graded for their quality and quantity. "For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S.415, 444-445.

A third ground in support of "the firstness of the First Amendment" is the importance of an unfettered opportunity for free expression in a self-governing society. If a democratic society is to survive, it requires intelligent discussion by members of the community. Without freedom of speech and thought, decision making by all members of society is rendered impossible. If governments "derive their just powers from the consent of the governed", the governed must have full freedom of expression, both in forming individual judgments and in forming the common judgment. The principle embraces "the right to participate in the building of the whole culture", and includes "all areas of human learning and knowledge". Emerson, *Ibid.* 7.

The fourth ground is exemplified by the aforementioned observations of Justice Harlan in *Cohen v. California*. Recognition of the emotive justification for the

preferred position given to First Amendment rights leads to an alleviation of individual and societal anxieties and tensions. If, as Justice Harlan observed, words are often chosen as much for their emotive as their cognitive force, "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process". 403 U.S. at 26. See, Comment, *The Preferred Position Re-examined: An Emotive Justification*, 51 Journal of Urban Law 255-284 (1973).

Freedom of expression, therefore, is plainly important for the enhancement of human dignity, a means of assuring individual self-fulfillment. A rational self-fulfillment helps to shape individual judgments. In addition, the First Amendment was adopted to implement and facilitate the people's power to govern themselves. These functions, self-fulfillment and societal participation, are essential structures of the First Amendment. Moreover, "it is the function of speech to free men from the bondage of irrational fears". *Whitney v. California*, 274 U.S.357, 376. Each individual in society must therefore be free to think, reason, know, consider, appreciate and imagine. He must have the unfettered right to decide what he shall say and what he shall write, what he shall read, what he shall see, and what he shall hear. This thinking process involves more than political discussion. It includes all ideas, informational, educational, entertaining, literary, artistic, political, scientific, or any other expression which will help to educate and mold the citizen for participation in the political and cultural life of a democratic society. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to

enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102.

C. The importance of ideas which are informational, educational, and entertaining has been recognized by this Court. See, *Winters v. New York*, 333 U.S.507, 510; *Stanley v. Georgia*, 394 U.S.557, 564. Entertainment is a source of pleasure and at the same time a means of educating the public. It can be penetrating, profound and brilliant. Very often in entertainment there may be found a re-examination of old assumptions and the spelling out of new issues for an era of social change. The works of an Aristophanes or a Rabelais are a source of entertainment, but they are also fraught with ideas which instructed the people of their times and continue to do so to the present day. One of the important functions of entertainment is to make conscious and manageable certain unacceptable unconscious forces in our own minds and in our interaction with other members of the community. In the variety, vividness, exaggeration, romanticism and humanity of entertainment, the viewer, reader or listener achieves a deeper perception of his own individuality and the society in which he lives.

With respect to informational ideas, this Court has often stressed their importance. "The State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S.479, 482. In *Wood v. Georgia*, 370 U.S.375, the Court held that a broad conception of the First Amendment's guarantee of freedom of speech and press is necessary to supply the public need for information and education with respect

to the significant issues of the times. It has been stated that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public". *Citizens Publishing Co. v. United States*, 394 U.S.131, 139-140.

The protection of ideas that are educational has also been the particular concern of the Court. As Justice Frankfurter stated in *Sweezy v. New Hampshire*, 354 U.S.234, 261:

> "Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling."

The importance, therefore, of emphasizing the protection afforded to informational, educational, or en-

tertaining ideas is manifest. This Court stated in *Red Lion Broadcasting Co. v. FCC*, 395 U.S.367, 390: "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." In *Time, Inc. v. Hill*, 385 U.S.374, 388, this Court reiterated that "no suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression" and, once again, that "the line between the informing and the entertaining is too elusive for the protection of . . . [freedom of the press]". In *United Mine Workers of America v. Illinois State Bar Association*, 389 U.S.217, 223, the Court emphasized again that "the rights of free speech and a free press are not confined to any field of human interest".

D. For all the foregoing reasons, *amicus* respectfully submits that the Court should clarify its ruling in *Miller* to the extent of enunciating the principle that the First Amendment protects works which, taken as a whole, have tangible "literary, artistic, political, scientific, informational, educational, entertaining ideas, or any other ideas of human interest". Such a clarification would make clear to trial and appellate judges that in obscenity prosecutions, as in all other cases which implicate First Amendment questions, the protective guarantees of the First Amendment remain undiminished.

Amicus has substituted the word "tangible" for the word "serious" on the assumption that this Court did not intend to eliminate ideas which are presented in the comic spirit. One of the things we all unconsciously seek in art, particularly in fiction, is the kind of understanding that is shared in laughter. The humorous

attitude can be liberating and elevating. See, *Modern American Humor*, edited by Bennett Cerf (1954); Freud, "Humour", in Vol. I *World of Psychology*, edited by G. B. Levitas 279-284 (1963).

Conclusion.

For the reasons set forth above, the judgment below should be reversed.

Respectfully submitted,

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Attorney for Amicus Curiae
for Adult Film Association.

SAM ROSENWEIN,
Of Counsel.

APPENDIX A.

In the United States District Court for the Middle District of Alabama, Northern Division.

United Artists Corporation, a Corporation, Plaintiff, v. E. L. Wright, Jr., Individually, and as Chief of Police, City of Montgomery, Alabama, Defendant, James H. Evans, as District Attorney for the Fifteenth Judicial Circuit of the State of Alabama; Robert L. Dorrough and Ardith C. Dorrough, Defendants—Intervenors. Civil Action No. 4208-N.

Filed: Jan. 5, 1974.

Before RIVES, Circuit Judge, and JOHNSON and VARNER, District Judges.

JOHNSON, District Judge:

Plaintiff, United Artists Corporation, brings suit under 42 U.S.C. § 1983 and 28 U.S.C. § 2201, seeking to have Chapter 64C of the Alabama obscenity statute, ALA. CODE tit. 14, §§ 374(16j)-(16o)(Supp. 1971), declared unconstitutional on its face and as applied. The constitutionality of a statute of statewide application being brought into question, a three-judge district court was convened pursuant to 28 U.S.C. § 2284. The case is submitted upon the pleadings, affidavits, briefs and depositions filed in this cause.

I. *Facts*

Plaintiff, a film distributor operating nationally, is the owner and distributor of the motion picture "Last Tango in Paris." Defendant E. L. Wright, Jr., is the Chief of Police of the City of Montgomery, Alabama, and is sued in his capacity as such and also individually. Intervening defendant James H. Evans is District

Attorney for the Fifteenth Judicial Circuit of the State of Alabama. Intervening defendants Robert L. and Ardith C. Dorrough are citizens of Montgomery, Alabama.

Plaintiff entered into an agreement with a local movie theater for the exhibition of the film "Last Tango in Paris." On October 11, 1973, without any prior administrative or judicial proceeding before a neutral party, the exhibitor received a written notice from defendant Wright that there was reasonable cause to believe that the exhibition of that film would constitute a violation of the Alabama laws regulating obscenity. The written notice pointed out that the exhibitor could seek a declaratory judgment in the proper state circuit court on the obscenity *vel non* of the film. Defendant Wright, in his written notice, informed the exhibitor that "the exhibition of this movie prior to obtaining the declaratory judgment might result in prosecution." The exhibitor then declined to show "Last Tango in Paris" in his theater. Thereafter plaintiff brought this action, in which he alleges the unconstitutionality of ALA. CODE tit. 14, §§ 374(16j)-(16o) (Supp. 1971) on its face and as applied.

II. *Standing*

Defendants contend that plaintiff lacks standing to prosecute this action because it has not been harassed, arrested, indicted or prosecuted in connection with the subject matter of this action. Plaintiff, however, is in privity of contract with its local exhibitor. Plaintiff's exhibitor has received an explicit threat or warning that, if it proceeds to show the film in question here, prosecution might well ensue. The exhibitor, on account of the threat of prosecution, declines to exhibit the

film. Plaintiff alleges that as a direct and proximate result of this written threat, pursuant to the statute alleged to be unconstitutional, it stands to lose approximately $20,000 in anticipated revenues. Whatever value might be put upon First Amendment rights in this case, it is clear that plaintiff alleges *financial* injury in fact sufficient to confer standing. The alleged financial injury is proximately caused by the action of defendant Wright acting pursuant to the challenged statute. In such cases as this, it is necessary that distributors as well as exhibitors have standing. *Interstate Circuit, Inc., v. Dallas,* 390 U.S. 676, 691 n.22 (1968).

Furthermore, the threat of arrest in this case is not "imaginary and speculative." *Younger v. Harris,* 401 U.S. 37, 42 (1971). The existence of a genuine threat of arrest suffices to confer standing. While it is true that defenses premised upon the First Amendment could be raised in a criminal prosecution resulting from an exhibition of "Last Tango in Paris," there is no requirement that citizens must "await and undergo a criminal prosecution as the sole means of seeking relief." *Doe v. Bolton,* 410 U.S. 179, 188 (1973). *Accord, Wulp v. Corcoran,* 454 F.2d 826, 830 (1st Cir. 1972); *Thoms v. Smith,* 334 F. Supp. 1203, 1207 (D. Conn. 1971) (3-judge court), *aff'd sub nom. Thoms v. Heffernan,* 473 F.2d 478 (2d Cir. 1973); *Anderson v. Vaughn,* 327 F. Supp. 101, 103 (D. Conn. 1971) (3-judge court). Plaintiff clearly has standing in this cause, and its claim is otherwise justiciable.

III. *Comity—The Younger Doctrine*

Defendants contend that this Court is precluded by the policy of comity from deciding this case on the merits. Certainly if there were a pending state criminal

prosecution against plaintiff, this Court would possibly be precluded from reaching the merits. *Younger v. Harris,* 401 U.S. 37, 54 (1971); *Samuels v. Mackell,* 401 U.S. 66, 72-73 (1971); *Perez v. Ledesma,* 401 U.S. 82, 83 (1971). A similar result could obtain if there were a pending civil process which leads to, or is a part of, a criminal prosecution. *Palaio v. McAuliffe,* 466 F.2d 1230, 1231-32 (5th Cir. 1972).

In this case, the letter from defendant cannot be said to constitute a pending criminal prosecution; nor can it be characterized as a pending civil process which leads to, or is a part of, a criminal prosecution. The notice letter here involved is, quite simply, a threat of prosecution. When a state criminal prosecution is only threatened, and not pending, many cases hold that the *Younger* doctrine does not bar a consideration on the merits of a cause. Courts recognized two reasons for so holding. First is the language in *Younger* noting that

> [t]here may, of course, be extraordinary circumstances in which the necessary irreparable injury can be shown even in the absence of the usual prerequisites of bad faith and harassment.

Younger v. Harris, 401 U.S. 37, 53 (1971). Applying this language, some courts have held that the absence of a pending prosecution, the imminence of a threatened prosecution, and a First Amendment challenge combine to form "extraordinary circumstances" within the meaning of *Younger. Wulp v. Corcoran,* 454 F.2d 826, 831 n.6 (1st Cir. 1972); *Anderson v. Vaughn,* 327 F. Supp. 101, 103 (D. Conn. 1971) (3-judge court).

Second, some courts have applied in cases like this what is termed a "pending/threatened" distinction, in holding that the *Younger* doctrine is inapplicable to situations in which a state prosecution is merely threatened. *Thoms v. Heffernan,* 473 F.2d 478, 483 (2d Cir. 1973); *Lewis v. Kugler,* 446 F.2d 1343, 1347 (3rd Cir. 1971); *Hull v. Petrillo,* 439 F.2d 1184, 1186 n.1 (2d Cir. 1971). The United States Court of Appeals for this circuit has adopted a further refinement of the pending/threatened distinction. If a state statute is attacked upon grounds of its unconstitutionality *as applied,* and no prosecution is pending, plaintiff must allege and prove bad faith prosecution or harassment. *Becker v. Thompson,* 459 F.2d 919, 923 (5th Cir. 1972), *cert. granted sub nom. Steffel v. Thompson,* 410 U.S. 953 (1973). *Accord, Milner v. Burson,* 470 F.2d 870, 874 (5th Cir. 1972). However, when a plaintiff attacks the *facial* constitutionality of a state statute, and there is no pending state criminal prosecution, a three-judge court is not foreclosed by *Younger* from a decision on the merits, even absent an allegation of bad faith or harassing official conduct. *Jones v. Wade,* 479 F.2d 1176, 1182 (5th Cir. 1973).

Applying these principles to this case, this Court holds that plaintiff's claim is not barred by the doctrine of comity, since a prosecution is merely threatened and since plaintiff alleges the unconstitutionality of the obscenity statute upon its face. Since it is not necessary for this Court to consider the unconstitutionality of the statute as applied (*i.e.,* the obscenity *vel non* of the movie), we do not need to consider whether there was in this case bad faith or harassing conduct by defendants. And, since we recognize and apply the "pending/threatened" distinction as declared by the

Fifth Circuit, it is not necessary to consider the applicability of the "extraordinary circumstances" exception to *Younger*.

IV. *Abstention*

Defendants also contend that this Court should, by reason of the abstention doctrine, decline to decide this case upon the merits. The doctrine of abstention, first espoused in *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496 (1941), is a judge-made doctrine to be used only in very limited circumstances. Congress has endowed the federal judiciary with power to render declaratory judgments. When a plaintiff chooses a federal forum for the adjudication of his case, the federal court is not obliged to dismiss the case merely because plaintiff could have brought his action in a state court. *Kusper v. Pontikes*, ... U.S. .... (1973); *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 510 (1972). To dismiss this case at this point, and to send plaintiff into state court, would cause a delay which would "itself effect the impermissible chilling of the very constitutional rights [plaintiff] seeks to protect." *Zwickler v. Koota*, 389 U.S. 241, 252 (1967).

The strongest case for abstention exists when there is a possible limiting construction which could be given a state statute by a state court, in order to avoid most or all of the constitutional problem. *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 510 (1972); *Wulp v. Corcoran*, 454 F.2d 826, 833 (1st Cir. 1972); *Lewis v. Kugler*, 446 F.2d 1343, 1346 (3rd Cir. 1971). In this case, there is no possibility of such a construction. The procedural portions of the statute here under attack contain defects which could not be eliminated by a narrow construction. That being so, there appears

to be no reason for the application of the doctrine of abstention. This Court is mindful of the pendency in the Alabama Supreme Court of several cases in which there are, *inter alia,* challenges to the constitutionality of the Alabama obscenity statutes. However, in those cases defendants were prosecuted criminally. Since criminal prosecutions present issues altogether different from instances of prior restraint, the pendency of the cases in the Alabama Supreme Court does not have sufficient bearing upon this case to warrant abstention. Plaintiff's choice of a federal forum will be honored, and this case will be decided upon its merits.

V. *Procedure under the Alabama Obscenity Statute*

Plaintiff asserts that the statute in question sets up a system of prior restraints upon First Amendment freedoms and that the statute fails to provide the safeguards which are constitutionally required under a system of prior restraint.

Chapter 64C of the Alabama obscenity statute, under attack here, provides that, prior to the commencement of a prosecution, one of several governmental officials must serve upon an exhibitor "prior written notice that there is reasonable cause to believe the material" in question is in violation of the obscenity statute. ALA. CODE tit. 14, § 374(16m)(a)(Supp. 1971). Then, the person receiving notice has 30 days within which "to file an appropriate action for declaratory judgment to determine the validity of such written notice." ALA. CODE tit. 14, § 374(16m)(c)(Supp. 1971).

Central to a decision in this case is the issue of whether or not this statutory "warning" constitutes a

prior restraint. Clearly the warning scheme is not an absolute prohibition against the showing of movies, as an injunction would operate in similar circumstances. However, a statutory scheme need not be published under the rubric "Censorship Statute" before it is considered an effective prior restraint. Courts must not be blind to the effect of a statute. One clear effect of this particular scheme is that the notice operates almost as effectively to bar movie exhibitions as an injunction would operate. Without such a notice exhibitors might well be willing to show movies which are arguably protected by the Constitution. However, when the government goes to the trouble to warn an exhibitor that criminal prosecution might ensue upon exhibition of a movie, few would dare ignore the warning. "People do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around . . . ." *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58, 68 (1963). Such a system of threatened prosecution "can constitute an all too effective prior restraint." *Poulos v. Rucker*, 288 F. Supp. 305, 310 (M.D. Ala. 1968). Therefore, this Court holds that Chapter 64C of the Alabama obscenity statute, ALA. CODE tit. 14, §§ 374(16j)-(16o)(Supp. 1971), is in legal effect a system of prior restraints.

But that holding does not end our inquiry. A system of prior restraints is not necessarily invalid. *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961). However, "[a]ny system of prior restraints of expression comes to . . . Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc., v. Sullivan*, 372 U.S. 58, 70 (1963). Because of the dangers inherent in the use of prior restraints, courts have established rigorous procedures which must be provided be-

fore a prior restraint may be held valid. These procedural safeguards are three in number.

A. *Burden of Proof.* When a system of prior restraints is used by the government to control speech or the press, the burden of proving that the material is unprotected must rest upon the censor. *Blount v. Rizzi,* 400 U.S. 410, 417-18 (1971); *Freedman v. Maryland,* 380 U.S. 51, 58-59 (1965); *Cinema Classics v. Busch,* 339 F. Supp. 43, 50 (C.D.Cal. 1972)(3-judge court); *Studio III, Inc., v. Smith,* 326 F.Supp. 1166, 1169 (S.D. Iowa 1971); *Embassy Pictures Corp. v. Hudson,* 242 F. Supp. 975, 978 (W.D. Tenn. 1965).

Under the Alabama statute, the burden is clearly upon the individual and not the government; when the statutory warning is given, the state need have only "reasonable cause" to believe that the material is obscene. Thereafter, if the exhibitor wishes to obtain a definitive ruling from a court, he himself must bring suit and carry the burden of proof. ALA. CODE tit. 14, § 374(16m)(c) (Supp. 1971). Since the statute *clearly* provides that the burden of bringing suit is upon the exhibitor, there is no reason to abstain in this case to hope for a narrowing construction from the state courts. Such a construction on this issue would have to disregard the plain language of the statute.

B. *Air of Finality to Censor.* The procedures of censorship may not constitutionally lend an air of finality to the action of the censor.

> To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either . . . [allow exhibition] or go to court to restrain showing the film.

Freedman v. Maryland, 380 U.S. 51, 58-59 (1965).

Under the procedural system of this statute, the decision of the official giving notice is for all practical purposes a final decision. The issuance of the warning effectively stops the showing of the film. The state is not required under the Alabama statute to go to court to obtain an injunction after adjudication. The warning is for all intents and purposes a "final" act of censorship and is, therefore, invalid.

C. *Prompt and Final Judicial Determination.* In order to provide a valid prior restraint system, a statutory scheme must provide a prompt final judicial decision. *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 142 (1968); *Grove Press v. City of Philadelphia*, 418 F.2d 82, 90 (3rd Cir. 1969); *Cinema Classics v. Busch*, 339 F. Supp. 43, 50 (C.D. Cal. 1972)(3-judge court); *National Ass'n of Theater Owners v. Motion Picture Comm'n of Milwaukee*, 328 F. Supp. 6, 12 (E.D. Wisc. 1971); *Studio III, Inc., v. Smith*, 326 F. Supp. 1166, 1169 (S.D. Iowa 1971); *Gundlach v. Rauhauser*, 304 F. Supp. 962, 965-66 (M.D. Pa. 1969); *United States v. A Motion Picture Film Entitled "Pattern of Evil,"* 304 F. Supp. 197, 200 (S.D.N.Y. 1965).

Nowhere in the Alabama statute is there a provision for expedited judicial consideration, either at trial or on appeal, of the issue of obscenity. This Court has not been made aware of any authoritative judicial decision of the State of Alabama providing for expedited consideration of civil adjudications of obscenity *vel non* under this statute. Such an adjudication is, therefore, liable

to all of the delays which are incident to the bringing of an ordinary civil action. This failing renders the Alabama statute invalid in that respect.

This Court, therefore, finds that the statutory system under which notice or warning is given pursuant to ALA. CODE tit. 14, §§ 374(16m)(Supp. 1971) is unconstitutional because of its procedural defects.

VI. *Unconstitutionality as Applied*

Since the statute is unconstitutional on its face, there is no necessity of determining whether it is unconstitutional as applied, *i.e.*, whether this particular film is obscene. Furthermore, it appears that the *Younger* doctrine as applied in this circuit might preclude such an inquiry, at least absent bad faith prosecution. *Becker v. Thompson*, 459 F.2d 919, 923 (5th Cir. 1972), *cert. granted sub nom. Steffel v. Thompson*, 410 U.S. 953 (1973).

VII. *Separability*

If the "notice" provisions in Chapter 64C of the Alabama obscenity statute are unconstitutional, as we today declare, this Court must determine whether the remainder of the statute must fall also. Principally this means that we must decide whether exhibitors may still be criminally prosecuted despite the invalidity of the notice provisions of Chapter 64C.

If a statute constitutes one inseparable whole, rather than several distinct and separable parts, a declaration of the unconstitutonality of one part must result in the failure of the entire statutory scheme. This "presents

a question of statutory construction and of legislative intent. . . ." *Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936).

There are two indicia in this case by which this Court is obliged to hold that Chapter 64C was intended to constitute one entire, indivisible statute, and not a series of independent parts. First, the legislature provided that no criminal prosecution could be commenced under this statute without first giving the required warning. ALA. CODE tit. 14, § 374(16m)(a)(Supp. 1971). Apparently the legislature viewed the warning and the prosecution as inseparable acts and expressly forbade prosecution in the absence of the required warning.

Second, the statute contains no separability clause.

> In the absence of such a provision, the presumption is that the Legislature intends an act to be effective as an entirety—that is to say, the rule is against mutilation of a statute; and if any provisions be unconstitutional, the presumption is that the remaining provisions fall with it.

Carter v. Carter Coal Co., 298 U.S. 238, 312 (1936). Under Alabama law, the absence of a separability clause means that the statute is to be considered as an indivisible whole. *San Ann Tobacco Co. v. Hamm*, 283 Ala. 397, 406, 217 So.2d 803 (1969).

This Court can only conclude that the Alabama legislature intended Chapter 64C to stand or fall as a whole, both notice provision and criminal provision. Accordingly, the entire statute must fall upon the declaration of unconstitutionality of the notice provision.

This Court, therefore, holds that ALA. CODE tit. 14, §§ 374(16j)-(16o) (Supp. 1971), is in its entirety unconstitutional and void. An injunction will issue against its enforcement.

Done, this the 5th day of January, 1974.

/s/ M. Johnson, Jr.
UNITED STATES DISTRICT JUDGE

/s/ R. E. Varner
UNITED STATES DISTRICT JUDGE

RIVES, Circuit Judge:

I concur in the foregoing opinion of my colleagues and adhere to similar views expressed in my dissenting opinion in *Grove Press, Inc. v. Bailey,* N.D. Ala. 1970, 318 F.Supp. 244 at 257-262, *vacated and remanded,* June 26, 1973, ...U.S. ...., 41 L.W. 3670.

/s/ Richard T. Rives
UNITED STATES CIRCUIT JUDGE